IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 23-11-2007

CORAM

THE HONOURABLE MR.JUSTICE S.PALANIVELU

CRIMINAL ORIGINAL PETITION Nos.23367 OF 2006
AND 1945 of 2007

CRL.O.P.No.23367 OF 2006 :

1.M/s.Terry Gold India Limited
rep.by its Joint Managing Director
Mr.D.Vinodh Singh.

2.Mr.Vinodh Singh
3.Mr.Ajay Singh
4.Mr.S.S.R.Kishen ... Petitioners

-vs-

M/s.TVS Finance and Services Ltd.,
rep.by its Executive-Legal
Mr.Sai Kumar ... Respondent

CRL.O.P.No.1945 OF 2007 :

1.M/s.Goldwon Textiles Limited,
rep.by its Managing Director
Mr.S.S.R.Kishen.

2.Mr.S.S.R.Kishen
3.Mrs.Shanthi Singh ... Petitioners

-vs-

M/s.TVS Finance and Services Ltd.
(Formerly known as M/s.TVS Lakshmi Credit Limited),
rep.by its Authorised Signatory
Mr.Sai Kumar. ... Respondent

Petitions under Section 482 of the Code of Criminal Procedure to call for the records in C.C.No.6010 of 2005 and C.C.No.14666 of 2006 on the file ofthe Learned XI Metropolitan Magistrate, Saidapet and III Metropolitan Magistrate, George Town, Chennai.

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For petitioners : Mr.V.Krishnamoorthy
For respondents : Mr.B.Kumar,
Senior Counsel,
for Mr.P.H.Manoj Pandian.

COMMON ORDER

While Criminal O.P.No.23367 of 2006 has been filed praying for quashing of the proceedings in C.C.No.6010 of 2005 pending on the file of XI Metropolitan Magistrate, Saidapet, Chennai, Criminal O.P.No.1945 of 2007 is for the similar relief with regard to C.C.No.14666 of 2006, pending on the file of III Metropolitan Magistrate, George Town, Chennai.

2. Since both the petitions involve an identical issue as also the parties are same, a common order is being passed.

3. Learned counsel have advanced arguments for both the petitions and placed their contentions on the same set of legal positions.

4. The gist of the averments in C.C.No.6010 of 2005 (Criminal O.P.No.23367 of 2006) is as under :

4.1. First petitioner/accused, represented by second and third petitioners/accused, misled the respondent/complainant by making false representations with a dishonest intention and inducing the respondent to provide lease finance facility for the machineries. On 31.07.1995, such facility for Rs.72,80,000/- was provided by the respondent, by letting on lease the machinery to the first accused, on the basis of a lease agreement. The first accused company also issued post-dated cheques and demand promissory notes and deposited 2,50,000 share certificates to the value of Rs.25.00 lakhs as collateral security, for the above said facility. Accused 2 to 4 stood as guarantors.

4.2. On 01.04.1998, a Memorandum of Understanding was entered into between the complainant (formerly known as M/s.Harita Finance Limited) and M/s.TVS Lakshmi Credit Limited, by means of which the assets and liabilities were transferred to the latter.

4.3. By a deed of assignment, dated 17.07.1998, M/s.TVS Lakshmi Credit Limited was amalgamated with M/s.Harita Finance Limited. A promissory note was also executed by the first accused, agreeing to repay the amounts. However, it did not pay hire charges and additional finance charges. The first accused fell sick and it moved an application before the Board for Industrial and Financial Reconstruction (BIFR).

4.4. With a dishonest intention, the accused induced the complainant to advance a loan of Rs.49,73,086/-. A Demand Loan Agreement, dated 31.12.2000, was also executed for the purpose, so also a promissory note.

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4.5. On 16.08.2001, a Memorandum of Understanding was entered into between the complainant and the first accused. As per Clause 6, shares to the value of Rs.1,90,00,000/- were agreed to be issued to M/s.Harita Finance, but it was not fulfilled.

4.6. On 25.11.2002, One Time Settlement was proposed by the accused. Since the accused were proposing to remove the machinery, the complainant filed an application under Section 9 of The Arbitration and Conciliation Act,1996, before the High Court and a Commissioner was appointed to take inventory of the machineries. At the time of inspection by the Commissioner, the accused created so many problems and they refused to return back the components of the machineries, which are 10 in number, thereby the accused caused wrongful loss to the complainant. The circumstances would clearly establish that the accused have entered into criminal conspiracy, by misappropriating the machineries, loan and money of the complainant and, hence, they are punishable under Sections 406,408,420 and 120-B IPC.

5. The averments in C.C.No.14666 of 2006 (Criminal O.P.No.1945 of 2007) go thus :

5.1. With a dishonest intention of cheating the complainant, second and third respondents approached him for lease finance facility. The machinery was let for lease to the accused by the complainant. First accused deposited 4.00 lakh shares as collateral security, under the lease agreement, dated 28.02.1996. There was no payment, despite the agreement.

5.2. On 01.04.1998, by means of a Memorandum of Understanding, the assets and liabilities of the complainant were transferred to M/s.Harita Finance Limited.

5.3. On 17.07.1998, a deed of assignment was entered into between the company and M/s.Harita Finance Limited on the one hand and the first accused on the other hand and also a revised payment schedule was agreed upon between the parties. A loan of Rs.46,97,313/- was agreed to be sanctioned by M/s.Harita Finance Limited to the first accused and the said amount was to be adjusted towards part of the outstanding amounts due. The first accused purposefully failed and neglected to pay the instalments and additional finance charges to M/s.Harita Finance Limited and M/s.Terry Gold India Limited. Rs.1,90,00,000/- was to be paid to M/s.Harita Finance Limited inter alia, but no such payment was made. Since the accused have caused a wrongful loss to the complainant by their attitude and with an intention to cheat dishonestly the complainant, the complaint came to be lodged and the accused are punishable under Sections 406,415 418 and 420 IPC.

6. At the outset, it shall be mentioned that in the petitions, it is stated that two different complaints have been lodged by the complainant with same set of facts, which is a sheer abuse of process of law, but, going by the allegations in both the complaints and for the fact

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that the causes of action for initiating the proceedings are different in both the matters, it could not at all be stated that both the complaints came to be filed with similar facts.

7. Mr.V.Krishnamoorthy, learned counsel for the petitioners would strenuously contend that the averments in both the complaints would go to show that they are of civil nature and when a remedy is available before the civil Court, the complainant cannot approach the criminal Court for the same remedy. It is further contended that even if the complaint is taken on its face value, it would attract breach of contract alone and not cheating and that the allegations in the complaints would not constitute any offences under the sections mentioned in the complaints.

8. Concedingly, the first petitioner's establishment has become sick and the matter is pending before BIFR, due to financial constraints. It is an admitted fact that the accused could not pay the dues in full, in respect of the agreement. But, the point, as to whether it would attract a criminal action, is the question to be answered.

9. In Application No.3057 of 2003 between M/s.TVS Finance and Services Limited and M/s.Terry Gold India Limited, this Court appointed an Advocate Commissioner to take possession of the machineries belonging to the complainant, namely, M/s.TVS Finance and Services Limited, which were in custody of M/s.Terry Gold India Limited, which were in the factory at Chityal, Nalgonda District, Andhra Pradesh. The Commissioner filed an interim report before the Court, a copy of which has been filed by the respondent.

10. Mr.B.Kumar, learned Senior Counsel for the respondents, would draw attention of this Court to certain portions of the Commissioner's Report, to show the continuous fraudulent intention on the part of the accused, to cheat the respondents.

11. This Court has perused the Commissioner's Report, from which it appears that in order to execute the order of the High Court, Mr.VR.Shanmuganathan, Advocate Commissioner, laboured hard and faced so many problems with the accused, by name, S.S.R.Kishen and his subordinates and also from the police in Andhra Pradesh. In spite of his hectic efforts taken on various days, he could not take delivery of the machineries in full and he has mentioned in his report that certain components of the machineries could not be taken possession of.

12. Learned counsel for the petitioners would contend that since the matter is of civil nature, it has been clothed with the colour of criminal liability and, hence, no criminal action could be initiated, on the strength of the complaints. In support of his contention, he garnered support from a decision of the Supreme Court in G.Sagar Suri and Another v. State of U.P. and Others, 2000 Supreme Court Cases (Cri) 513), wherein it is observed as under :

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> "Jurisdiction under Section 482 of the Code has to be exercised with great care. In exercise of its jurisdiction, the High Court is not to examine the matter superficially. It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process, a criminal court has to exercise a great deal of caution. For the accused, it is a serious matter. The Supreme Court has laid certain principles on the basis of which the High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."

13. The learned counsel also placed much reliance upon a Full Bench decision of the Apex Court in Anil Mahajan v. Bhor Industries Ltd. and Another, 2006 (1) Supreme Court Cases (Cri) 746, in which it is held as follows :

> "From mere failure of a person to keep up promise subsequently, a culpable intention right at the beginning, that is, when he made the promises cannot be presumed. A distinction has to be kept in mind between mere breach of contract and the offence of cheating. It depends upon the intention of the accused at the time of inducement. The subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent, dishonest intention is shown at the beginning of the transaction. The substance of the complaint is to be seen. Mere use of the expression "cheating" in the complaint is of no consequence."

14. As per his contention, every promise, which was not fulfilled at the later point of time, will not constitute a criminal breach of contract and an offence of cheating and it would only depend upon the inducement on the part of the accused at the inception.

15. As far as the said aspect is concerned, prima facie, the averments in the complaints would show the criminal intention on the part of the accused from the inception. The merits with regard to their fraudulent inducement could be gathered from the oral evidence of both parties at the time of trial.

16. Learned counsel for the petitioners also drew attention of this Court to a decision in Uma Shankar Gopalika v. State of Bihar and another, 2006 (2) Supreme Court Cases (Cri) 49, wherein it is observed thus :

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"6....It is well settled that every breach of contract would not give rise to an offence of cheating and only in those cases breach of contract would amount to cheating where there was any deception played at the very inception. If the intention to cheat has developed later on, the same cannot amount to cheating. In the present case, it has nowhere been stated that at the very inception there was any intention on behalf of the accused persons to cheat which is a condition precedent for an offence under Section 420 IPC."

17. As per the dictum laid down in the above ruling, the allegations in the complaints should show that even from the inception the accused were acting in a fraudulent manner, to extract benefits from the complainant. So far as the case on hand is concerned, a scrutiny of the complaints would show that even from the beginning the accused were dealing with the complainant with a dishonest intention to cheat and the said allegations are sufficient enough to see prima facie that there was a fraudulent intention on the part of the accused right from the beginning.

18. Further, according to the learned counsel for the petitioners, the complainant, having filed cases against the petitioners/accused under Section 138 of The Negotiable Instruments Act, cannot subsequently initiate proceedings under every provision of law and such proceedings are not at all legally sustainable.

19. Repelling the said submission, learned Senior Counsel for the respondent took me to a decision of this Court in V.Kannan v. State, by District Crime Branch, 2007 (2) M.L.J.(Cri) 83, in which a learned Judge, followed the principles laid down by the Supreme Court in Central Bank of India v. M/s.Saxons Farms, 2000 M.L.J.(Cri) 356 (SC) and a Full Bench decision of the Andhra Pradesh High Court in Opts Marketing Pvt.Ltd. v. State of A.P., 2001 CRL.L.J.1489. The gist of both the decisions, as culled out in the above said decision of this Court, and the view of this Court are extracted as under :

"9. The Hon'ble Supreme Court of India has held in Central Bank of India v. Saxons Farms reported in (2000) MLJ (Crl) 356 (SC) that :

'13.Under Section 142 of the Act, Court can take cognizance of an offence punishable under Section 138 only on a complaint in writing made by the payee. Therefore, the police could not have started investigation under Section 138 of the Act. But if a cheque is dishonoured, drawer may expose himself to prosecution under various sections of the Indian Penal Code which

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are cognizable and police could take up investigation. What was indicated in the notice was that in addition to the legal action by the appellant-bank under the Act, option was kept open for taking action against the respondents under the provisions of Indian Penal Code by informing the police. Therefore, the contention of learned counsel for the respondents has no force.'

10. The Andhra Pradesh High Court in a Full Bench decision in a case in Opts Marketing Pvt.Ltd. v. State of A.P. (2001 Cr.L.J. 1489) has held as follows :

'Even after introduction of S.138 of the Negotiable Instruments Act, prosecution under Section 420 I.P.C.is maintainable in case of dishonour of cheques or post-dated cheques issued towards payment of price of the goods purchased or hand loan taken, or in discharge of an antecedent debt or towards payment of goods supplied earlier, if the charge-sheet contains an allegation that the accused had dishonest intention not to pay even at the time of issuance of the cheque, and the act of issuing the cheque, which was dishonoured, caused damage to his mind, body or reputation.'

11. In view of the settled principle of law laid down by the Apex Court and the decision of the Full Bench of Andhra Pradesh High Court as cited supra and in view of the materials available on record, this Court is of the considered view that initiation of proceedings for the offence under Section 420 I.P.C. against the petitioner in spite of the proceedings pending against the petitioner for the offence under Section 138 of the Negotiable Instruments Act would not amount to double jeopardy."

20. The conclusion arrived at by this Court on the strength of the decision aforestated would make it clear that there would be no question of double jeopardy and even though the proceedings have been taken under Section 138 of The Negotiable Instruments Act, it would not, in any way, bar the prosecution under the provisions of the Indian Penal Code.

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21. The learned Senior Counsel for the respondents would also cite a decision of the Supreme Court in M/s.Indian Oil Corporation v. M/s.NEPC India Ltd. & Ors., 2006 (6) Supreme 66, in which the Apex Court has formulated various guidelines, after referring to its earlier decision. The relevant principle, which is applicable to the facts of the present case, is as follows :

> "A given set of facts may make out : (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceeding are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not."

22. As per the rationale laid down by the Supreme Court, merely because the allegations in the complaints apparently show the dispute as one of civil nature, it would not be a ground for quashment and the test applied is, to ascertain whether the allegations make out a criminal offence or not.

23. A thorough reading of the allegations in the complaints would unambiguously shows that they attract criminal offences as against the petitioners and, by no stretch of imagination, it could be concluded that the complaints have to be quashed, though they are also civil in nature.

24. In view of the settled legal principles and also in the light of the reasonings given above, I hold that the prayer for quashing of the complaints is not legally sustainable. The complaints have to reach their logical conclusions by a competent Court, on the basis of their own merits, which could be considered by the said Court, on appreciation of oral evidence on record. Hence, these petitions are dismissed. Consequently, the connected Criminal M.P.Nos.1 of 2006 and 1 of 2007 are also dismissed.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. The XI Metropolitan Magistrate,
Saidapet, Chennai.

2. The III Metropolitan Magistrate,
George Town, Chennia.

3. 1 & 2 Thro' The Chief Metropolitan Magistrate,
Chennai.

4. The Public Prosecutor,
High Court, Madras.

1 cc To Mr.P.H.Manoj Pandian, Advocate, SR.69862.
2 cc To Mr.M.V.Krishnamurthy, Advocate, SR.69764, 69765.

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1945 of 2007

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